

# INSURANCE COVERAGE FOR DATA BREACHES AND PRIVACY VIOLATIONS

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# Coverage A: “Bodily Injury”

- We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies.

# Coverage A: “Property Damage”

- A. Physical injury to tangible property, including all resulting loss of use of that property.
- B. Loss of use of tangible property that is not physically injured.

# Coverage A: “Property Damage”

- Financial Institution Litigation:
  - Does the loss of use of credit/debit cards and the need to replace them constitute “property damage” under CGL policies?

# Limitations on Coverage

- For the purposes of this insurance, electronic data is not tangible property.
- As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

- This insurance does not apply to
- p. Electronic Data
- Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

- As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

# Coverage B: “Personal and Advertising Injury”

- Coverage B provides coverage for damages because of “personal and advertising injury”
- “Personal and Advertising Injury” is defined in part as injury arising out of “[o]ral or written publication, in any manner, of material that violates a person’s right of privacy



# Coverage B: “Publication”

- Courts Interpret “Publication” Differently.
  - Some require dissemination to the public at large
  - Some merely require dissemination to a third party
  - Some do not require dissemination at all

# Coverage B: “Publication”

- *Recall Total Information v. Federal Ins. Co.*
  - “Regardless of the precise definition of publication, we believe that access is a necessary prerequisite to the communication or disclosure of personal information. In this regard, the plaintiffs have failed to provide a factual basis that the information on the tapes was ever accessed by anyone.”

# Coverage B: “Publication”

- *Travelers Indem. v. Portal Healthcare Solutions*
  - “Publication occurs when information is ‘placed before the public,’ not when a member of the public reads the information placed before it. By Travelers’ logic, a book that is bound and placed on the shelves of Barnes & Noble is not ‘published’ until a customer takes the book off the shelf and reads it.... [This] does not comport with the term’s plain meaning, and the medical records were published the moment they became accessible to the public via an online search.

# Coverage B: “Publication”

- *Zurich Am. Ins. Co. v. Sony Corp.*, No 651982/2011 (N.Y. Supr. Ct. Feb. 21, 2014)
  - Must the Insured do the Publishing
  - Publication is akin to “Pandora’s Box”
  - Phrase “in any manner” does not alter the meaning of “publication”

# Coverage B: “A Person’s Right of Privacy”

- Some courts hold that “privacy” means both the right of secrecy (publicity to private life) and the right to be left alone (intrusion upon seclusion)
- Some courts hold that “privacy” only means the right of secrecy and does not include the right to be left alone

# Limitations on Coverage

- This Endorsement Changes the Policy. Please read it carefully.

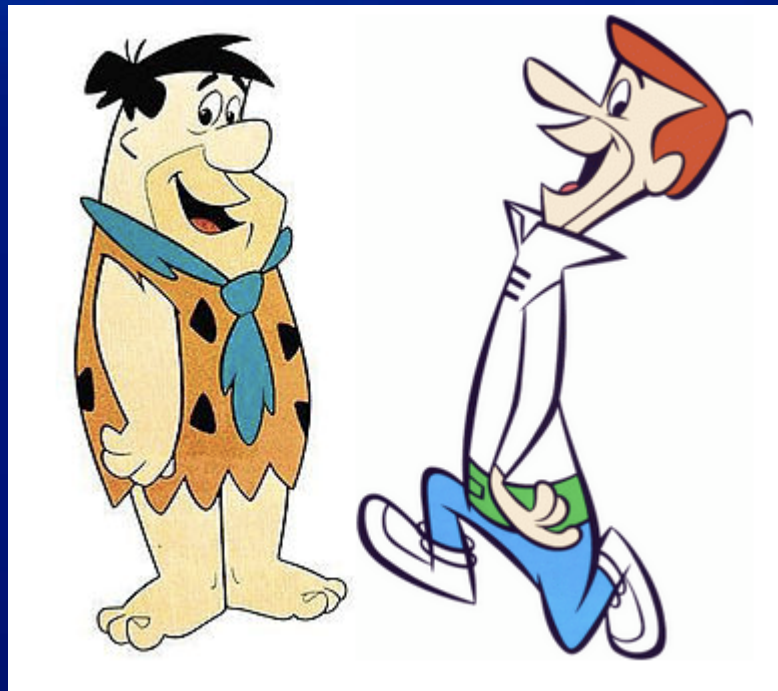
- **AMENDMENT OF PERSONAL AND ADVERTISING INJURY DEFINITION**

- This endorsement modifies insurance provided under the following:
  - COMMERCIAL GENERAL LIABILITY COVERAGE PART
  - With respect to Coverage B Personal And Advertising Injury Liability, Paragraph 14.e. of the Definitions section does not apply.
- 14. “Personal and advertising injury” means injury, including consequential “bodily injury”, arising out of one or more of the following offenses:
  - e. Oral or written publication, in any manner, of material that violates a person’s right of privacy;

# “Cyber” Insurance

- Information, Data Security and Technology Coverage

# What Does "Cyber" Insurance Mean?





# Issues Covered

- 1. Steps to Take and Concerns to Note When a Policyholder Advances a Breach Claim
- 2. Specific Concerns Arising out of Other Information and Technology Coverage

# Policyholder Breach Claims: Insurer's Perspective

- Breach events require a rapid response.
- Insurer Must Protect Both Policyholder's Interests (i.e. breach response team), as well as its own (i.e. reservation of rights).

# Insuring Agreement

- Information and Technology Policies are like a buffet: not everyone gets the same thing.
- Does your Insuring Agreement cover all aspects of the breach response?

# Warranties and Conditions

- Did the Policyholder promise to have certain computer and system security protections in place throughout coverage?
- Did that promise form the basis of a warranty or condition of the Policy?
- Did the Policyholder comply with the warranty/condition?

# Notice

- Policies generally require that notice be given within a certain period of time, “immediately” or “promptly” following discovery of the breach.
- Did the Policyholder comply?

# Retroactive Dates

- Policies will often expressly exclude breach events that result from viruses or malware that were found to be in the Policyholder's system prior to a certain date.

# Corporate Misfeasance

- Policies will exclude the fraudulent or criminal acts of certain corporate actors: Officers and Directors, but sometimes also certain identified employees.

# Sublimits

- Much of the risk of individual carriers is managed through sublimits.
- Different sublimits may apply to different elements of breach response (e.g. computer forensics vs. notification vs. Public Relations costs).
- Sublimits will also impact the role of excess carriers.



# Additional Concerns

- Territorial Limits
- Use of Unlicensed Software Exclusions
- War / Terrorism Exclusions
- Other Insurance

# Protecting Insurer's Policy Rights

- Advise policyholder promptly in respect of potential limitations on coverage.
- Reserve rights, including right to recoup expenses and costs for non-covered elements of claim.
- Breach counsel cannot act as coverage counsel.

# Other Information and Technology Cover

- In addition to breach coverage, policies may give coverage for:
  - Business Interruption
  - Contingent Business Interruption
  - Technology Errors & Omissions
  - Media and Infringement Claims
  - Regulatory Claims
  - Cyber-Extortion
  - Rogue Employee Coverage
  - And More...

# Business Interruption

- Business interruption coverage is available for incidents where the policyholder's own system either goes down, or is taken down because of a computer security threat.
- Subject to significant coverage concerns
  - Trigger of Coverage differs amongst insurers
  - Exclusions for Fraud, interruptions because of physical injury
  - Net Profits/loss or gross profits/loss.

# Contingent Business Interruption

- Contingent business interruption coverage is available for incidents where a service provider's information or technology services are interrupted.
- Subject to significant coverage concerns:
  - Was the service provider identified in the policy?
  - Was the service that was interrupted, or the peril that caused the interruption one that was identified in the policy?
  - Time element and sublimits.

# Technology Errors & Omissions

- Third party coverage against misrepresentations in respect of technology products or services.
- A different branch of coverage, but frequently sold in conjunction with information risk policies.
- Cover limitations generally reflect traditional errors and omissions coverage: fraudulent, criminal or other dishonest, malicious or intentional conduct are excluded.

# Thank you!

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Called to the Bar of  
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LL.M. (Hons.), University  
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Middle Temple  
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Member, Law Society of  
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Member, Advocates'  
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Member, Defence Research  
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Dominic practises principally in the area of insurance litigation encompassing both coverage and defence matters. He specializes in advising and representing insurers with respect to commercial general liability, directors' and officers' liability and commercial property policies. Dominic has significant experience in the defence of products liability and sexual abuse litigation. He has appeared as counsel in the Ontario Superior Court of Justice and the Ontario Court of Appeal. Dominic is a frequent lecturer to professional bodies. He has published numerous articles on insurance and is a contributing editor to the leading Canadian insurance text, Snowden and Lichty, Annotated Commercial General Liability.

Rated by Lexpert Canadian Legal Directory as a Leading Practitioner (repeatedly recommended) in Commercial Insurance Litigation.

Named in the Legal Media Group's Guide to the World's Leading Insurance & Reinsurance Lawyers.

Listed in The Best Lawyers in Canada®, Insurance Law Category

Listed in the Global Law Experts Directory as an insurance and reinsurance expert in Canada.

Member, Ontario Bar Association; The Advocates' Society; Defense Research Institute.

Dominic is a graduate of Cambridge University, England, where he obtained both an M.A. and an LL.M. He was called to the Bar of England & Wales in 1988 and to the Bar of Ontario in 1992.

### PUBLICATIONS

- Co-author: "Commercial General Liability Insurance Policies - The Duty to Defend Post Progressive Homes" for Osgoode Professional Development National Update

- Co-author: for the *Commercial Insurance Litigation - Recent Developments of Importance* 11th Edition of The Canadian Legal LEXPERT Directory
- Co-author: "Personal Injury Coverage Issues in the Internet World" Paper for OBA Professional Development, Solving Commercial General Liability Policy Issues program
- Co-author: "Liability Insurance Case Law" for Lexpert
- Co-author: "The Expanding World of Employment Practices and Employee Benefits Coverage Claims" for CDLA
- Co-author: "Personal Injury Coverage in the Internet World" for Canadian Insurance Coverage Symposium
- Co-author: "Commercial Insurance Litigation Recent Developments of Importance"
- Co-author: "The Expanding World of Employment Practices and Employee Benefits Coverage Claims (Part 1)" 26 Can. J. Ins. L. 21-34
- Co-author: "The Expanding World of Employment Practices and Employee Benefits Coverage Claims (Part 2)" 26 Can. J. Ins. L. 41-50





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Called to the Bar of  
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LL.M., University of British  
Columbia, 2000

J.D., Seattle University Law  
School, 1998

B.A., University of Victoria,  
1994

Member, Law Society of  
British Columbia

Member, Washington State  
Bar Association

Member, Pro Bono Law  
of BC

Member, Canadian Bar  
Association (Ontario)

Member, Defence Research  
Institute

David, a partner in the firm's Insurance Coverage Counsel and Insurance Litigation Groups, practices both commercial and insurance litigation, with an emphasis on insurance coverage, reinsurance and complex multi-party disputes. He has acted as counsel in claims concerning property damage and business interruption, environmental liability, privacy breach, products liability, personal injury, construction defect, commercial disputes, and reinsurance disputes. He has acted as subrogation counsel and has defended class action claims.

He is licensed to practice in Ontario, British Columbia and Washington State. He has also received an LL.M. degree from the University of British Columbia.

### RECENT DECISIONS AND MATTERS

- Acted as coverage counsel for liability insurers in respect of construction defect claims
- Acted as coverage counsel in property damage and business interruption claims
- Acted as coverage counsel for liability insurers in respect of privacy actions and class actions
- Acted as counsel for reinsurers and cedants in reinsurance disputes
- Acted as subrogation counsel in large multi-party fire losses
- Acted as coverage counsel for insurers with respect to claims arising out of domestic, U.S., and international environmental contamination
- Acted as coverage counsel for insurers with respect to toxic tort/products liability claims
- Acted as coverage counsel for insurers with respect to historic sexual abuse claims
- *Kruger Products Limited v. First Choice Logistics Inc.*, 2010 BCSC 1242, successfully subrogated against defendants in a major fire loss

- *Donaldson v. Pacific Promotions et al.* 2009 BCCA 38, acted as counsel in respect of the defence of commercial host liability claims
- *Khanna v. Nederpel* 2007 BCSC 1335, successfully defended a road maintenance contractor in a claim for personal injuries arising out of a car accident in icy conditions
- *Palmer v. City of Burnaby* 2006 BCSC 165, successfully resisted a demand for injunctive relief arising out of concerts in Burnaby's Deer Lake Park

### LECTURES AND PUBLICATIONS

- *Data Risk, Privacy Breach and Insurance Coverage in Canada: The International Comparative Legal Guide to Insurance & Reinsurance*, 2014
- *Data Risk, Privacy Breach and Insurance Coverage: BC Broker Magazine*, June 2013
- *Privacy Protection and Insurance Coverage in Canada in the Electronic Age: Expert Guides*, 2013
- *Current Issues in Commercial Liability Insurance: Canadian Bar Association Annual General Meeting, Vancouver, August 2012* (with Marcus Snowden)
- *Recent Developments In Canadian Insurance Coverage Litigation: Canadian Defence Lawyers Insurance Conference, February 2012* (with Mark Lichty)
- *Clarification of the Essential Issues of Timing of Loss and Allocation of Costs: A Case Study of General Electric Canada v Aviva and Dominion*, Canadian Institute Insurance Conference, 2011



- “Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada, 2010 SCC 33”, Insurance Bulletin, September 2010, referenced in Claims Canada Magazine and reprinted in the Defence Research Institute’s “Covered Events” newsletter
- 2007; DRI Construction Defect Claims Compendium Chapter on Canadian law in respect of insurance coverage for construction defect claims
- “Passports Please: Cross Border Issues in Insurance Coverage” DRI’s Insurance Coverage and Claims Conference, December 2006, New York, NY (with Mr. Justice Paul Walker)
- “Keeping it Straight: Excluding Business Risks, Concurrent Causation and the Reasonable Expectations of the Parties”
- “CGL Triggers and Allocation in Progressive or Continuous Loss” Canadian Institute’s 2006 Construction Law Conference, Vancouver, BC (with Mr. Justice Paul Walker)